INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
1. The selection of the jury	2
2. The evidence and the questioning by the court	4
Argument	6
Conclusion	8

CITATIONS

Cases:

Belvin v. *United States*, 12 F. 2d 548, certiorari denied, 273 U.S. 706	7
Frazier v. *United States*, 335 U.S. 497	6
Graham v. *United States*, 257 F. 2d 724	6
Harbold v. *United States*, 255 F. 2d 202	7
Haussener v. *United States*, 4 F. 2d 884	7
United States v. *Gordon*, 253 F. 2d 177, reversed, 344 U.S. 414	6

Statutes:

26 U.S.C. 4704(a)	2
26 U.S.C. 4705(a)	2

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 592

CHARLES R. JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R.S.C. 3)[1] is reported at 295 F. 2d 355.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1961 (R.S.C. 4). On November 10, 1961, Mr. Justice Whittaker extended the time for filing a petition for a writ of certiorari to and including December 11, 1961. The petition was filed on December 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R.S.C." refers to papers designated by petitioner as the transcript of record in the Supreme Court. "R." refers to the transcript of record in the court of appeals.

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QUESTIONS PRESENTED

1. Whether, after conviction, petitioner can challenge the impartiality of a jury which he accepted without having made any challenges for cause and without having exercised more than half of his peremptory challenges.

2. Whether petitioner was deprived of an impartial jury as a matter of law by the fact that six jurors had sat in prior trials at which witnesses appearing against petitioner had testified as to different crimes involving other defendants.

3. Whether there was improper questioning of witnesses by the court.

STATEMENT

Petitioner was tried in the United States District Court for the Northern District of Oklahoma on a two-count indictment charging the purchase and sale of narcotics in violation of 26 U.S.C. 4704(a) and 4705(a), but a mistrial was declared when the jury was unable to agree (R. 3, 9–10). Some two weeks later he was tried on the same indictment before a jury and was convicted on both counts (R. 5, 50). Petitioner was sentenced to imprisonment for ten years on each count, the terms to run concurrently (R. 5). The court of appeals affirmed (Pet. 15–18).

1. *The selection of the jury.* Two days before the beginning of the second trial, petitioner filed a motion for a continuance "until such a time as the persons residing in this judicial district who are likely to be chosen as jurors shall be less inflamed and prejudiced by the adverse publicity * * * that has attended the

* * * prosecution of this defendant" (R. 4). On the same day he also filed a motion to quash the entire jury panel alleging that he had previously been tried before a jury drawn from the same panel and that "by reason of the multiplicity of defendants tried before the current jury panel on the same or similar charges with which this defendant is charged" and of the publicity attending these trials, "it is and would be impossible for him to obtain a jury which had no knowledge or prior opinions concerning the transactions which are at issue in the case at bar" (*ibid.*). These allegations were not supported by affidavits or other evidence. On the day of the second trial, after the court had been informed that six new jurors not theretofore reporting during the term had been added to the jury panel, making twenty-eight members in all, the court overruled the petitioner's motion to quash the panel and ordered the jury called (R. 10–11).

Thereafter the court on *voir dire* examination apprised the prospective jurors of the prior mistrial and asked them, *inter alia,* whether they had read or heard anything at all about petitioner's case, whether they had discussed the case or the purported facts of the case with any person serving on the jury which sat at petitioner's first trial, and whether they would be prejudiced in this type of case in such a way that they could not render a just verdict solely upon the evidence and in conformity with the instructions (R. 12–16, 17–26). The court then permitted defense counsel to phrase his own inquiries to the pro-

spective jurors (R. 16). Counsel first inquired whether the panel would be prejudiced because it was a narcotics case. He then continued (R. 16):

> * * * And the mere fact that other defendants were found guilty of narcotics earlier in the week, you would be able to lay aside because I believe most of you jurors sat on those jury cases—just because the evidence in that case convicted certain people, you could lay aside that evidence that was presented at that trial and just listen to the evidence that comes from the witness stand today—would you be able to do that?
>
> I believe that's all.

The defendant exercised no challenges for cause and only 5 of his 10 peremptory challenges (R. 17–26). The jury as selected consisted of 4 of the new members of the panel, 2 from the old panel who had sat on none of the previous narcotics cases and 6 of the old panel who had been on such cases, all of which involved other defendants and other transactions (Pet. 17).[2]

2. *The evidence and the questioning by the court.* The government's evidence was developed through the testimony of Raymond Potter, an admitted felon and addict turned informer, who purchased narcotics from petitioner. His testimony was corroborated by that of three others—a fellow addict, a state narcotics

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[2] These facts appear in the opinion of the court below. The court's opinion further recites that there were 13 defendants who were tried prior to petitioner's second trial and that the government witnesses against petitioner had testified in some of the trials (Pet. 16).

officer, and a federal narcotics agent, Charles Casey, who overheard the sale transaction from his place of concealment in the trunk of Potter's automobile.

During the direct examination of the addict, Potter, the court asked why he communicated to the agents his information concerning petitioner, whether he had received any promises from the agents, and what was the number and nature of offenses pending against the witness (R. 32–34). Potter answered that he hoped that cooperation with the police would help him in pending cases and that he had received no promises from the agents (R. 33–34).

During the cross-examination of the federal agent Casey, the court inquired whether it was customary for an agent to ride in the trunk of a car for the purpose of overhearing conversations (R. 42). It asked why the agents would use an addict with a criminal record in this type of case; the witness answered that a criminal would have the contacts with the type of person who would sell narcotics (R. 42–43). The court inquired whether the agents would try to persuade a person to sell narcotics who would not otherwise be disposed to violate the law; the witness indicated that he was too busy trying to apprehend persons predisposed toward crime to try to persuade an honest citizen to sell narcotics (R. 43).

The court later overruled the motion of defense counsel that its inquiries to the agent Casey and the answers thereto be stricken (R. 44–45).

ARGUMENT

1. Petitioner attacks here the composition of a lawfully selected jury. As the court of appeals found (Pet. 17), his complaint of partiality comes too late in view of his failure to make any challenges for cause or to exercise any more than half of his peremptory challenges. *Frazier* v. *United States,* 335 U.S. 497; *Graham* v. *United States,* 257 F. 2d 724 (C.A. 6). Nor did his pretrial motion to quash the entire jury panel suffice to raise this objection. As the court below noted (Pet. 17), the contention that the jurors had heard previous narcotics trials involving the same government witnesses concerned only six of the twelve jurors who tried petitioner and hence could not properly be raised in this challenge to the impartiality of the panel as a whole. See *United States* v. *Gordon,* 253 F. 2d 177, 184 (C.A. 7), reversed on other grounds, 344 U.S. 414. The contention that petitioner did raise with respect to the panel as a whole (*i.e.,* the effect of alleged publicity attending these trials) was wholly devoid of any evidentiary foundation (Pet. 17).

Petitioner argues that the mere fact that six members of his jury sat in other narcotics cases in which one or more witnesses against him had testified constitutes such implicit bias that the court was required to take precautionary measures to protect his interest despite his failure to urge on *voir dire* that the jurors might be prone to attach undue credibility to the testimony of witnesses whom they had previously heard. In fact, the court exercised considerable cau-

tion to assure a fair trial. It inquired at length to determine whether the jurors could in *this* case act fairly on the basis of *this* evidence to render a just verdict (R. 15, 17–26). And defense counsel was permitted to ascertain that the jurors who had sat in the earlier cases "could lay aside that evidence that was presented at that trial and just listen to the evidence that comes from the witness stand today" (R. 16). Knowing the facts, defense counsel asked this general question but entered no challenges for cause.

Moreover there is nothing inherently prejudicial as a matter of law in the fact that jurors may have heard the same witnesses in prior trials. *Haussener* v. *United States,* 4 F. 2d 884, the Court of Appeals for the Eighth Circuit met an almost identical contention with the comment (4 F. 2d at 886):

> If, when one case has been tried, the entire panel of jurors sitting therein is disqualified from sitting as jurors in every other case of a similar sort, trial courts will be so far impeded in the transaction of their business as to make the enforcement of this act [the Volstead Act] difficult, if not impossible. * * *

See also *Belvin* v. *United States,* 12 F. 2d 548 (C.A. 4), certiorari denied, 273 U.S. 706; *Harbold* v. *United States,* 255 F. 2d 202 (C.A. 10).

2. There is no merit to petitioner's argument that the trial court erred in making inquiries of government witnesses. The questions put were germane to the issues, served to clarify the facts, and could not have served unduly to bolster the credibility of the government testimony. The trial court's inquiry of

the informer Potter elicited the fact that the witness had a motive in testifying for the government, a fact which, if anything, was helpful to petitioner, who had suggested that he had been framed; similarly, the questions the court asked the federal agent Casey were at least as likely to suggest framing to the jury as they were to enhance the witness's credibility (see R. 49). Moreover, the jurors were told that they were the sole judges of the credibility of the witnesses (R. 49), that in determining the weight of testimony they should take into consideration the fact that two of the government's witnesses had been convicted of serious public offenses (R. 47), and that they should follow their own judgment despite any impression they may have had as to the court's views (R. 50).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
JULIA P. COOPER,
BEATRICE ROSENBERG,
Attorneys.

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